IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.6 OF 2006

IN

NOTICE OF MOTION NO. 1543 OF 2005

IN

S.C. SUIT NO.4237 OF 1983

M/s. Standard Plastics .. Appellant

versus

M/s. Quality Bursh Company .. Respondent

...

Mr. Bangera with Mrs V.N. Bangera for appelant

Mr. Suresh Gole for respondent.

CORAM : D.G. KARNIK, J

DATED :26th September 2006.

P.C:-

1. Heard counsel for the parties.

2. This appeal is directed against the Judgement and Order dated 22nd November, 2005 passed by the City Civil Court, Mumbai rejecting the appellant's motion

for setting aside the decree passed against him and for restoration of the suit.

3. The respondent filed a suit bearing suit no. 4237 of 1983 against the appellant in the City Civil Court, Mumbai. Suit summons was served on the appellant who appeared through his advocate Mr Bharat Choudhari but did not file a written statement. It appears that on account of pendency of large number of suits, the suit was not listed before the Judge till the year 1999 though the appellant had not filed a written statement. The suit was placed before the concerned Judge on 25th January, 1999 who directed issuance of notices to the parties and their advocates. Mr. Gole, advocate for the plaintiff-respondent appeared in pursunace of the notice but the defendant and his advocate did not appear before the Court. On 5th August, 1999 the Court further directed the plaintiff to serve the defendant by letter to be sent Under Certificate of Posting. Accordingly Mr Gole, advocate for the plaintiff informed the defendant by Certificate of Posting and thereafter the matter appeared before the Court on 27th September, 1999. The appellant appeared through his advocate and Mr Choudhari appeared for defendant. Mr Choudhari, advocate then informed the Court that on 21st

September, 1999 he had addressed a letter to the defendant stating that he would be withdrawing his appearance for want of instructions. Thereafter the matter was adjourned to 28th September, 1999 on which date the Court passed a decree against the defendant-appellant under Order 8 Rule 5 read with Order 8 Rule 10(2) of the Code of Civil Procedure. Appellant thereafter did nothing for nearly six years. However, in the year 2005 the appellant took out a motion, bearing N.M. No.1543 of 2005, for setting aside the decree passed against him and for restoration of the suit file by condoning the delay in taking out the notice of motion. After hearing the parties, the court held that the suit was decreed under Order 8 Rule 5 read with Order 8 Rule 10(2) of the Code of Civil Procedure and therefore proper remedy for the appellant was to file an appeal against the decree and not an application under Order 9 Rule 13 of Code of Civil Procedrue. It held that in respect of decree passed under Order 8 Rule 5 read with Order 8 Rule 10(2) of the Code of Civil Procedure, an application under Order 9 Rule 13 of the Code of Civil Procedure was not maintainable. That Judgement is impugned in this appeal.

4. Learned counsel for the appellant submitted that

the decree in the present case could not have been passed under Order 8 Rule 5 but deemed to have been passed under Order 17 Rule 2 of the Code of Civil Procedure which says that when the defendant is absent the Court may proceed under any provisions of Order 9 of the Code of Civil Procedure. In support of his submissions counsel relied upon two decisions of two single Judges of this Court viz: Steamship Mutual Under Writing Association (Bermuda) Ltd. vs. Thakur Shipping Company Ltd., reported in 2001 (2) Mh.L.J. 392 and Chandrakant Babulal Panchal vs. Ashwinibhai Mancharam Patel, reported in 2002(4) ALL MR 305. Per contra, Mr Gole learned counsel for the respondent submitted that the learned Judge in his order dated 28th September, 1999 while decreeing the suit has specifically observed that he was passing the decree under Order 8 Rule 5 and Rule 10(2) of the Code of Civil Procedure and therefore decree must be held to have been passed under Order 8 Rule 5 and Rule 10(2) of the Code of Civil Procedure and there was no scope for holding that the decree was passed under Order 17 Rule 2 of the Code of Civil Procedure. He further submitted that indisputedly the appellant had not filed a written statement and therefore the court was entitled to proceed under Rule 5 and Rule 10(2) of Order 8 of the Code of Civil Procedure. The Court did

exercise that power and proceeded under Rule 5 and Rule 10(2) of Order 8 of the Code of Civil Procedure and it was so reflected in the decision of the court. The decree was Rule 5 and Rule 10(2) of Order 8 of the Code of Civil Procedure. In respect of such a decree the only remedy was to file an appeal and not an application under Order 9 Rule 13 of Code of Civil Procedure. In support he referred to and relied upon the decision of a Division Bench of this Court in Dhanwantrai R. Joshi and others vs. Satish Dave and others reported in 1998(3) Mh.L.J. 924 and decisiion of a single Judge in Tejabai Tejshi and others vs. Smt. Gangubai Dinanath Ulvekar, reported in 2002(1) Mh.L.J. 350 and my own decision in Gaurang V. Merchant & Ors. vs. Madhliso & Co. Pvt. Ltd. & Ohters, reported in 2004(2) ALL MR 737.

5. In Steamship Mutual Under Writing Association (supra) a single Judge of this Court, on facts of that case, held that the decree therein was not passed under Order 8 Rule 5 of the Civil Procedure Code but was passed under Order 17 Rule 2 of the Code of Civil Procedure which empowered the Court to proceed under Order 9 of the Code of Civil Procedure. Similarly in Chandrakant Babulal Panchal (supra) another single Judge of this Court came to the conclusion that decree

passed therein was a decree passed under Order 17 Rule 2. In this view of the matter in those two decisions this Court came to the conclusion that the decree being passed under Order 17 Rule 2 of the Code of Civil Procedure, an application for restoration could be made under Order 9 Rule 13 of the Code of Civil Procedure.

6. In Dhanwantrai R. Joshi case (supra) Division Bench of this Court has clearly laid down in respect of a decree passed under Rule 5 and 10(2) of Order 8 of the Code of Civil Procedure, the proper remedy is to file an appeal against the decree. Division Bench has further held that in such a case application under Order 9 Rule 13 would not be maintainable. In view of the decision of Division Bench only question that is required to be considered by me is whether the decree in the present case was passed under Rule 5 and Rule 10(2) of Order 8 of the Code of Civil Procedure or was passed under Order 17 Rule 2 of the Code of Civil Procedure.

7. At this stage it would be useful to refer to the order passed by the Court on 28th September, 1999 decreeing the suit. The relevant portion of the order reads thus:-

"The defendants though represented have failed to file their written statements. The defendants as well as their advocates have been given notice of the hearing of the suit. The defendant's advocate has withdrawn his appearance for want of instructions. The averments in the plaint are not controverted. The Plaintiffs are entitled to a decree under the provisions of Order 8 Rule 5 and 10(2) of the Code of Civil Procedure."

8. The learned Judge has clearly stated that he was proceeding under Order 8, Rule 5 and Rule 10(2) of the Code of Civil Procedure. In my view, this expression by the learned Judge of the reasons for passing of the decree must be respected. In Tejabai Tejshi vs. Smt. Gangubai Dinanath Ulvekar (supra) this Court has laid down that when the order passing a decree makes a specific reference to a particular provision under which the order is passed (i.e. Order 8 Rule 5 and 10(2) of the Code of Civil Procedure) then it is not open to the superior court before whom the matter is in appeal, to infer that the order was not passed under that provision but was passed under some other provision, so as to justify the maintainability of the appeal filed before it. In that case the learned

trial Judge had mentioned in the order that he was passing the decree under Order 8, Rule 5 of the Code of Civil Procedure. The motion taken out by the defendant for restoration of the suit was dismissed. In the appeal against the decision in the motion it was contended that the order could not have been passed under Order 8, Rule 5 and must be deemed to have been passed under Order 17 Rule 2 of the Code of Civil Procedure. Distinguishing the decision of this Court in Steamship Mutual Under Writing Association (supra) the Court held that the decree must be deemed to have been passed under Order 8, Rule 5 in view of the specific mention to that effect in the order of the court. Relying upon the decision of this Court in Tejabai Tejshi case, I hold that decree in the present case was passed under Order 8, Rule 5 and Rule 10(2) of the Code of Civil Procedure and was not passed under Order 17 of Code of Civil Procedure.

9. In this view of the matter, the only remedy for the appellant was to file an appeal against that decree and he could not have applied for restoration of the suit under Order 9 Rule 13 of the Code of Civil Procedure. The decision rendered by the trial court is thus in accordance with law and is hereby confirmed.

10. The appeal is accordingly dismissed.

(D.G. KARNIK, J.)